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EFFECT OF DEMURRING TO THE EVIDENCE ON MATTERS RELATING MERELY TO THE QUANTUM OF RECOVERY.—The interesting question as to whether a demurrer to the evidence operates as an admission of the truth of all the demurree's evidence which affects merely the *amount* of recovery and not the *right* of recovery was recently raised but not decided by the Supreme Court of Appeals of Virginia in *Lavenstein Bros.* v. *Hartford Fire Ins. Co.* (Va.), 99 S. E. 579. In the original opinion, as reported in the Southeastern Reporter, the court held that the demurrer did operate as an admission of all the opponent's evidence, whether material to the right of recovery or not. But on motion for rehearing, though the rehearing was denied, the court altered its original opinion by holding that in consideration of all the evidence it was unnecessary to decide the point in question, thus declining to commit itself to either view.*

On principle it would seem that the court erred in its original opinion. It is clearly necessary in a demurrer to the evidence that it admit all of the evidence of the party against whom it is di-

*In its altered opinion, the court said: "We so hold without at this time passing on the interesting question of whether under our present practice the demurrer to evidence rule applies to the consideration by the jury of the evidence on the issue of the quantum of recovery to which a demurrant may be entitled, subject to the opinion of the court on the demurrer, which issue is still to be decided by the trial jury notwithstanding the demurrer to evidence."

rected concerning the material facts of the case.[1] If a demurrer were allowed when material facts still remained in dispute, this would force the court to pass upon the facts and thus encroach upon the province of the jury.[2] This is evidently the reason for the rule which requires the demurrant to admit the truth of all the evidence of the demurree relating to facts essential to his right of recovery. But this reason does not apply to matters affecting merely the quantum of recovery, for that is never determined by the court[3] (except where the damages are liquidated). The amount of the damage is invariably assessed by a jury;[4] and so, even though the evidence bearing on the *amount* remain in conflict, the court may still, without passing upon conflicting evidence, decide the demurrer as to the *right* of recovery, provided all the material facts shown by the demurree's evidence be admitted. And since the reason for the rule does not apply, it would seem that the rule should not apply.

This conclusion is strengthened by the analogy of the demurrer in pleading, which "admits as true all averments of *material* facts which are sufficiently pleaded,"[5] and the further rule of pleading that "every pleading is taken to confess such *traversable matters* alleged on the other side as it does not traverse."[6] These rules, it will be observed, do not extend to immaterial facts (which are not traversable[7]); and matters of aggravation affecting merely the quantum and not the right of recovery are immaterial within this rule.[8] Hence it would seem that in demurring to the evidence the demurrant should not be required to admit matters of aggravation affecting merely the amount of damages, for such an admission is not necessary to the decision of the point in controversy —whether the demurree's evidence establishes a *right* to damages.

Authority on the point is very scant, and the only jurisdictions which appear to have passed upon it, Alabama and Tennessee,[9] reached opposite conclusions. In Alabama, where upon overruling a demurrer, the lower court submitted the issue as to damages

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[1] Trout *v.* Va., etc., R. Co., 23 Gratt. 619; Richmond, etc., R. Co. *v.* Anderson, 31 Gratt. 812; University *v.* Snyder, 100 Va. 567, 42 S. E. 337; 38 Cyc. 1543, *et cit.*

[2] Hopkins *v.* Nashville, etc., R. Co., 96 Tenn. 409, 34 S. W. 1029, 32 L. R. A. 354.

[3] Boyd *v.* Gilchrist, 15 Ala. 849; Hanover Ins. Co. *v.* Lewis, 23 Fla. 193, 1 South. 863; Mathews *v.* Traders' Bank, 2 Va. Dec. 539, 27 S. E. 609.

[4] Young *v.* Foster, 7 Port. (Ala.), 420; Humphrey *v.* West, 3 Rand. 516.

[5] BURKS, PLEADING AND PRACTICE, § 206.

[6] STEPHEN, PLEADING, 9th Am. ed., 216; BURKS, PLEADING AND PRACTICE, § 447; Colley *v.* Sheppard, 31 Gratt. 312.

[7] Bowman *v.* Bowman, 153 Ind. 498, 55 N. E. 422.

[8] STEPHEN, PLEADING, 9th Am. ed., 242; BURKS, PLEADING AND PRACTICE, § 451. See Leech *v.* Widsley, 1 Vent. 54.

[9] The reports abound in expressions to the effect that the demurrant admits *all* the demurree's evidence, but the Alabama and Tennessee cases seem to be the only ones in which the point has been squarely before the court.

to the jury on the evidence as admitted in the demurrer, it was held on appeal that this was error and the judgment was reversed.[10]

The court said:

> "It is too clear to admit of argument, that the price or value of the corn could have no influence in affirming or denying the propositions contained in the pleas.
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> "If, as insisted, all the facts set out and admitted on the record, are evidence on the trial of the writ of enquiry of damages, they are conclusive, and can not be gainsaid, although when offered and admitted, it was extraneous matter, having no reference to the issues the court was to try. In its results, if such a principle were adopted, it might lead to most injurious consequences. A fact thus incautiously admitted, would operate in the nature of an estoppel. We cannot, therefore, in the absence of all authority, recognize such a principle as law."

The Tennessee court, however, has held that the demurrer does admit the truth of all the demurree's evidence, whether relating to the right or the amount of recovery.[11] It reached this decision through holding that the jury which assessed the damages was confined in its consideration to the evidence which had been set forth in the demurrer; and the only evidence so set forth in Tennessee, as in nearly all jurisdictions, is that of the demurree.[12] Thus the jury in assessing damages is confined to the evidence of the demurree, whether it relates to matters material to the right of recovery or to matters of aggravation.

In defense of this ruling, the court said in *Southern Queen Mfg. Co.* v. *Morris*:[13]

> "The defendant cannot object to an assessment of damages upon a transcript of evidence which he admits by his demurrer to be true and unimpeachable. The filing of the demurrer to the evidence originally submitted by the plaintiff precluded the introduction of any additional testimony. The defendant thereby admitted that the evidence introduced by the plaintiff established the facts of the case, and the only question made by the defendant was that, as matter of law, these facts did not constitute actionable negligence."

This reasoning seems rather too technical. The purpose of the demurrer to evidence is to deny that the plaintiff has made out a case in law. It seems hard that in doing so the defendant should be required to admit collateral matters, which must, however, all

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[10] Young *v.* Foster, *supra.*

[11] Southern Queen Mfg. Co. *v.* Morris, 105 Tenn. 654, 58 S. W. 651; Coleman *v.* Bennett, 111 Tenn. 705, 69 S. W. 734. See also Nashville, etc., R. Co. *v.* Sansom, 113 Tenn. 683, 84 S. W. 615.

[12] *Supra*, see note 11. See also 38 CYC. 1545, *et cit.*

[13] 105 Tenn. 654, 58 S. W. 651.

be set forth in the demurrer, since the court above can judge whether they are material. In so doing, the defendant has gained no advantage, nor has he caused the plaintiff to suffer any loss. It would seem to be stretching the doctrine of estoppel too far to apply it to this case.[14]

Further on in the same opinion it is said:

> "If the original record of the testimony can be opened for one purpose, it can be opened for all; and thus a controversy would be presented over every question involved in the original trial, and the office of a demurrer to the evidence thereby absolutely destroyed."

It is difficult to see how this follows. The original record of the testimony might very easily be opened for all purposes affecting the amount of damages without questioning the right to a recovery. The function of the demurrer to evidence is to question the sufficiency of the evidence in point of law,[15] and this function is not touched by a ruling allowing the jury to pass upon conflicting evidence as to the quantum of recovery in case the court holds that the evidence as admitted establishes a right of recovery.

But whether the above ruling is sound or not in general practice, it would appear to be inapplicable in Virginia. It is based fundamentally upon the theory that the jury in assessing damages are confined to the evidence as set forth in the demurrer, and this in general practice is only the evidence of the demurree.[16] But in Virginia all of the evidence on both sides is set forth in the demurrer,[17] although only the evidence of the demurree and that of the demurrant not in conflict therewith is considered in ruling upon the sufficiency of the evidence to make out a legal claim.[18] Hence, if it were held in Virginia that the jury should decide the amount of damage from the evidence as set forth in the demurrer, it might still be called upon to sift conflicting evidence as to such amount; and so the demurrant need not be held to have admitted the truth of the demurree's evidence on that point.

A reason that might in many jurisdictions be advanced for hold-

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[14] In 16 Cyc. 796, it is said: "A party who has, with knowledge of the facts, assumed a particular position in judicial proceedings is estopped to assume a position inconsistent therewith to the prejudice of the adverse party. It is necessary, however, that the claim or position previously asserted or taken should have been *successfully maintained;* that it should be *actually inconsistent* with the position presently taken, and that it should not have been taken through the fault of the adverse party." (Italics supplied). This does not seem to fit the case.

[15] Suydam *v.* Williamson, 20 How. 427, 15 L. Ed. 978; Bryan *v.* State, 26 Ala. 65.

[16] Southern Queen Mfg. Co. *v.* Morris, *supra;* 38 Cyc. 1545, *et cit.*

[17] Hyers *v.* Green, 2 Call 555, 3 V. R. A. 403; Hyers *v.* Wood, 2 Call 574, 3 V. R. A. 408; Green *v.* Judith, 5 Rand. 1, 8 V. R. A. 303.

[18] Bowers *v.* Bristol Gas Co., 100 Va. 533, 42 S. E. 296. In probably every other jurisdiction save West Virginia, only the demurree's evidence is considered. 38 Cyc. 1542, *et cit.*

ing that the demurrant admits all of the demurree's evidence, whether material to his right of action or mere matter of aggravation, is that in these jurisdictions the practice of demurring to the evidence is looked upon with disfavor, even where it has not fallen altogether into disuse.[19] Further, the right to demur is not *stricti juris;*[20] and it is discretionary with the court whether it shall compel a joinder.[21] By the operation of these principles, it might be permissible to compel the demurrant to make the admissions in question before being allowed to demur, if such action should be deemed to be in accordance with the general policy of the law in those jurisdictions. But this would scarcely be the case in Virginia, for here the demurrer to evidence is frequently resorted to, and is perhaps more favorably regarded than in any other jurisdiction except West Virginia.[22] And furthermore, in Virginia, whenever the demurrant has a right to demur, the courts compel a joinder in the demurrer,[23] provided the grounds of demurrer are specifically set forth in writing.[24]

To sum up, it appears that probably in all jurisdictions (except Tennessee), in which the practice of demurring to the evidence exists, and almost certainly in Virginia, the party demurring should not be held to have admitted the evidence of his opponent that relates merely to the quantum of damages.

REGISTRY OF SUBSEQUENT ENCUMBRANCE AS NOTICE TO PRIOR MORTGAGEE IN MORTGAGE TO SECURE FUTURE ADVANCES.—A mortgage is a valid encumbrance, not only as security for money advanced at the time of execution, but also for advances to be made in future.[1] The prior mortgage, duly recorded, is superior to subsequent liens or encumbrances, when the advances sought to be secured are made *without notice* of the subsequent encumbrances. This is equally true, whether the making of further ad-

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[19] The practice of the different States is reviewed in Hopkins *v.* Nashville, etc., R. Co., *supra*, where it is said that the practice of demurring to the evidence now exists in seventeen of the States.

[20] Jones *v.* Ireland, 4 Iowa 63. See also Trout *v.* Virginia, etc., R. Co., *supra.*

[21] Morrison *v.* McKinnon, 12 Fla. 552. See also Brandon *v.* Huntsville Bank, 1 Stew. (Ala.) 320, 18 Am. Dec. 48.

[22] As is evidenced by the fact before noticed that only in these jurisdictions is the demurrant's evidence considered in passing upon his demurrer. Bowers *v.* Bristol Gas Co., *supra.*

[23] Johnson *v.* Chesapeake, etc., R. Co., 91 Va. 171, 21 S. E. 238; Eubanks *v.* Smith, 77 Va. 206. A party has a right to enter such a demurrer, except where the evidence being clearly against him, his motive is to delay the decision, or where the court doubts what facts should be reasonably inferred from the evidence demurred to. Citations, *supra.* Also, University *v.* Snyder, *supra.*

[24] Va. Code, 1919, § 6117.

[1] Commercial Bank *v.* Cunningham, 24 Pick. (Mass.) 270; Alexandria Savings Inst. *v.* Thomas, 29 Gratt. (Va.) 483.